IN THE

Supreme Court of the United States.

October Term, 1942.

No. 366.

THE UNITED STATES, PETITIONER,

v.

BROOKS-CALLOWAY COMPANY.

On Writ of Certiorari to the Court of Claims.

BRIEF FOR RESPONDENT.

GEORGE R. SHIELDS,
HERMAN J. GALLOWAY,
JOHN W. GASKINS,
FREDERICK W. SHIELDS,
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TABLE OF CASES CITED.

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BRIEF FOR THE RESPONDENT.

Opinions Below.

The opinion of the Court of Claims (R. 18-22) is not yet reported.

Jurisdiction.

The judgment of the Court of Claims was entered on June 1, 1942 (R. 22). The petition for a writ of certiorari was filed on September 1, 1942, and was granted on October 19, 1942. Jurisdiction of this Court rests upon Section 3 (b) of the Act of February 13, 1925, as amended.

Question Presented.

Whether the proviso to Article 9 of the contract which provides that a contractor shall not be charged with liquidated damages for any delays due to unforeseeable causes beyond the control and without the fault of the contractor,

including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, etc., precludes the assessment of liquidated damages for delays to the work caused by high water.

Contract Provision Involved.

Article 9 of the contract in suit (R. 6; Finding 5, R. 13-14), so far as here material, provides:

"Article 9—Delays Damages: • • • • •

"*Provided*: That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes: *Provided further*, That the contractor shall within ten days from the beginning of any such delay notify the contracting officer in writing of the causes of delay, *who shall ascertain the facts and the extent of the delay*, and his findings of fact thereon shall be final and conclusive on the parties hereto, subject only to appeal within thirty days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay shall be final and conclusive on the parties hereto. (italics added).

Statement.

The facts are accurately but incompletely stated in petitioner's brief (pp. 4-7). The additional facts of record which need to be considered are as follows:

Respondent planned to build Section "C" of the St. Gabriel Levee, starting at the *lower* end, which was the logical and reasonable way to do the work. It was required,

through no fault of its own, to begin work at the *upper* end, thereby making the work much more susceptible to damage and delay from wet borrow pits. (Par. 7 of petition, R. 2; Finding 8 (a) R. 15; Finding 10, R. 16).

Another fact not referred to in petitioner's statement has to do with the tie-in that was required and which is covered by Paragraph 8 of the petition, R. 2; Finding 8 (b), R. 16; Finding 11, R. 17. Respondent says that however proper the order of the contracting officer to build this tie-in may have been, the fact was that doing so prevented the *then* completion of the work and was responsible for all the subsequent delay; in other words, the work straight ahead connecting the new levee with the old could have been built in about the same time that the tie-in ordered, turning off at an angel from the new levee to connect with the old, was built.

Summary of Argument.

The contracting officer decided that all of the delay in completion was due to high water. He had the right and duty so to decide. He had no authority to decide that part or all of the high water was "foreseeable." High water actually preventing work was a "flood." Floods are not foreseeable and were defined by the contract as "unforeseeable". The contract properly construed did not authorize the assessment of liquidated damages for delays in completion of the work occasioned by high waters or floods.

Argument.

Contracting Officer's Decision was a Finality as to extent of Delay due to High Water.

The contract, Article 9, *supra*, provides that in the event of claim of delay, the contracting officer shall "ascertain the *facts* and the *extent* of the delay, and his findings of fact thereon shall be final and conclusive on the parties

hereto," with exceptions not here involved, unless it be noted that the contracting officer's decision was never communicated to the contractor (last paragraph of Finding 8 (b), R. 16) whereby the latter was deprived of any chance of the right of appeal to the Chief of Engineers.

But passing this very important failure of the contracting officer, amounting possibly to a positive breach of contract—the contractor was entitled to his *decision* on its claim, and to the right of *appeal* therefrom, both here denied by the procedure followed. It remains that the contracting officer did determine that the whole delay in the completion had been due to high water and that the contractor "should have foreseen" a delay of 183 days ($3,660 at $20 per day) of delay due to such cause (See Findings 7, 8, R. 14).

Respondent says that this decision as to the *cause* and *extent* of delays occurring was correct and *final*, but as to whether all or any part of the delay was "foreseeable" by the contractor, that was a matter outside the scope of any power or authority given him by the contract to decide. The contract so provides.

Article 9 of the contract provides that the contractor shall not be charged with liquidated damages for any delays "due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, *including, but not restricted to*, acts of God, or of the public enemy, acts of the Government, fires, *floods*, epidemics, quarantine restrictions, strikes, freight embargoes, and *unusually severe weather*. * * *." (Italics supplied.)

The use of the word "including" would seem to show that floods and the other enumerated causes are illustrative examples of unforeseeable causes of delay which are to be considered in and of themselves as being "unforeseeable" and therefore excusable. See *Montello Salt Co.* v. *Utah*, 221 U. S. 452; *Phelps Dodge Corporation* v. *Labor Board*, 313 U. S. 177, 189; *Federal Land Bank* v. *Bismarck Lumber Company*, 314 U. S. 95, 100. Such an interpretation

does not, as petitioner contends, make the work "including" a word of addition. It merely removes all doubt as to whether the enumerated causes are to be regarded as unforeseeable.

If, as contended by petitioner, the contracting officer must determine whether floods, strikes, fires, or any of the other specified causes, are "unforeseeable", nothing is gained by the enumeration of such causes. The language following the word "including" would thus become pure surplusage. It is well settled that a construction which would give this effect should be avoided. *Burdon Sugar Refining Co.* v. *Payne*, 167 U. S. 127, 142; *Platt* v. *Union Pacific R. R. Co.*, 99 U. S. 48, 58; *Ladd* v. *Ladd*, 8 How. 10, 28; *Bethlehem Steel Co.* v. *United States*, 75 C. Cls. 845, 868. Petitioner suggests (pp. 8-10 of its brief) that the enumerated causes were inserted merely to avoid a narrow construction of the proviso, such as limiting it to acts of God. This suggestion is without merit. There was no reason to suspect that "unforeseeable causes" would ever be limited to acts of God.

An analysis of the specified causes supports the conclusion that they were intended to be regarded as "unforeseeable" under the terms of the contract. It is impossible to foresee precisely when such causes will take place, or the extent to which they will effect the work. This Court itself has held that the bursting of the Mississippi River through its natural banks or through artificial dikes is an unforeseen event or accident, even though such an event often occurs. *Viterbo* v. *Friedlander*, 120 U. S. 707, 732, 733; see also *Cubbins* v. *Mississippi River Commission*, 241 U. S. 351, 367. Common sense dictates the conclusion that the word "unforeseeable" was used in Article 9 in this same sense, and that the parties did not intend to charge respondent with liquidated damages for a period when floods did not permit it to work.

It should also be noted that only one of the enumerated causes in the proviso to Article 9 is qualified in any way.

That one is "severe weather", which is preceded by the word "unusually." The lack of any such qualification before any of the other specified causes strongly indicates that they are regarded as "unforeseeable" under the contract. The rule of *expressio unius est exclusio alterius* applies.

It appears, therefore, that under a reasonable construction of Article 9 a "flood" must be construed as being in and of itself an "unforeseeable" cause of delay.

Even if the meaning of Article 9 is doubtful, such doubt should be resolved against the respondent who prepared the contract. *American Surety Co.* v. *Pauly*, 170 U. S. 133, 144; *Garrison* v. *United States*, 7 Wall. 688, 690: *The Insurance Companies* v. *Wright*, 1 Wall. 456, 468. Especially should this be true where, as here, the petitioner seeks to charge the respondent with liquidated damages.

In addition, the interpretation for which respondent contends will, in the long run, operate to petitioner's advantage. In the first place, if the parties know definitely that the specific causes must be considered excusable, litigation with regard to such causes will be avoided. Moreover, if bidders can be sure that certain causes will be regarded as unforeseeable, they will not include in their bids a contingent amount to cover liquidated damages for delays from such causes. Thus, the Government would secure lower bids. The interpretation requested by petitioner, on the other hand, would increase the uncertainty of contractors regarding relief from liquidated damages and would force them to raise their bids to allow for such uncertainty.

Petitioner stated (page 12 of its brief) that the contract called for completion of the work within 450 days, and that under normal circumstances there would be high water during 183 days, thus leaving 267 days in which high water would not interfere with the work. Petitioner then states (pages 12, 13) that a contractor who forsaw that he would have only 267 working days would count on using more men and equipment than one who planned to do the work in 450

days, and thus would have more men and equipment idle during high water than the latter. The result, says petitioner (pages 13-14) is that the contractor who anticipates delay from high water will include the cost of "stand-by" charges of the extra equipment in his bid and will thus be underbid by the contractor who fails to anticipate high water. Petitioner then concludes that the latter will get the contract, but will not be able to finish on time. This elaborate argument is purely speculative and has no bearing on the question involved in this case. It would be just as logical to assume that a contractor who anticipated high water would place sufficient equipment on the job to complete the work before the high water occurred, thus avoiding "stand-by" charges entirely.

High Water Preventing all Contract Work was a "Flood"

Respondent can offer no specific court case as authority for its premise. It can only rely on the dictionaries—and on what would appear to be plain common sense. The undertaking was to build a levee. The levee was required to be built of *dry* earth materials. Any *high water*—whether or not it was of greatly overflowing proportions—which overflowed the river banks and *flooded the borrow pits* from which necessary materials had in part to be procured, was, it is submitted, in reason a "flood" within the contract meaning. The contracting officer determined that all the delay in completion was occasioned by "high water." Could this mean anything other than that all the delay was due to "floods"?

The conclusion of the court below (R. 19) that high water which overflowed the river banks and stopped the work was a "flood" is reasonable. Webster's Dictionary defines a "flood" as "A great flow of water; a body of moving water; the flowing stream, as of a river; especially a body of water rising, swelling and overflowing land." As the court below pointed out, the term is not restricted to an overflow, although here the river apparently overflowed the

river banks, but not the existing levee. When it is considered that the term "floods" is mentioned in Article 9 as one of the excusable causes of delay, it becomes obvious that the term was intended to include rising water which caused a stoppage of the work.

In a footnote to page 14 of its brief petitioner cites three cases for the proposition that high water which overflows the banks of a river, but fails to top the levee, would not be a flood. In none of these cases was there a levee. All three cases, *LeBrun* v. *Richards*, 210 Cal. 308, 291 P. 825; *Poole* v. *Sun Underwriters Ins. Co.*, 65 S. D. 422, 274 N. W. 658, and *Mogle* v. *Moore*, 16 Cal. (2d) 104 P. (2d) 785, involved only the question whether the waters were surface or flood waters. Clearly, they have no bearing on the question presented in the instant case. Even if they did hold that the waters of a river must overflow the protecting levee in order to constitute a flood, they are in conflict with the views expressed by this Court. In *Cubbins* v. *Mississippi River Commission*, 241 U. S. 351, 362, the Court decided the following proposition in the negative:

> "Its solution involves deciding whether the complainant as an owner of land fronting on the river had a right to complain of the building of levees along the banks of the river for the purpose of containing the water in times of flood within the river and preventing it from spreading out from the river into and over the alluvial valley through which the river flows to its destination in the Gulf, * * *."

Clearly, this Court does not hold the view that the water of a river must overflow the protecting levee in order to be a flood.

In a footnote to page 15 of its brief, petitioner cites two cases as holding that the word "floods" does not include normal, seasonable high water.

In the first case, *Herminghaus* v. *Southern California Edison Co.*, 200 Cal. 81, 252 P. 607, the court first laid down

the rule that an upper riparian owner may divert flood waters but may not divert the normal flow of a river to the detriment of a lower riparian owner. The court then held that regular, seasonal accretions in the flow of a river were not flood waters and that the lower riparian owner could not, therefore, be deprived of their benefit. It is not clear that the river overflowed its banks as in the present case. On the contrary, it appears that during the periods of high water the water flowed into well-defined channels of sloughs which crossed the property of the lower riparian owner. In any event, the court was not concerned with any contract provision, such as Article 9, which deals primarily with causes which delay the contractor's work.

The other case, *Mammoth Gold Dredging Co.* v. *Forbes*, 39 Cal. App. (2d) 739, 104 P. (2d) 131, involved the interpretation of a deed which described the property granted as lying "between the present high water mark on the right hand bank of the Yuba River and the center of said river." The only question presented was whether the property extended to a visable high-water mark existing on the permanent perpendicular bank or merely to a temporary gravel bank adjacent to the diminished summer flow of the river. The court held that the property extended to the high-water mark existing on the permanent river bank, citing *Herminghaus* v. *Southern California Edison Co., supra.* It is clear that the high-water mark lay within the permanent banks of the river. Respondent fails to see what bearing this case has upon a case where the river overflowed its banks. It is also obvious that the court was not concerned with the effect of such an overflow upon a contractor's work, or with a contract provision similar to the Standard Article 9.

Even if these cases did hold that seasonable high water overflowing a river's bank does not constitute a flood, they appear to be in conflict with the views of this Court. See *Cubbins* v. *Mississippi River Commission* and *Viterbo* v. *Friedlander, supra.*

"Floods" Were and Are Unforeseeable.

Based on past history, floods might *possibly* be expected, but not *certainly*. The "past history" considered by the contracting officer as indicating such a possibility included the unexampled flood years of the late 1920's. No one could fairly anticipate or foresee recurring floods of like proportions. And in any event, who can say that one must foresee and provide against contingencies the happening of which can only be determined by the event? And besides, and over weighing all this respondent submits that fairly construed the contract listed "floods" as among the "unforseeable" causes of delay that would excuse the assessment of damages.

Conclusion.

For the foregoing reasons it is respectfully submitted that the decision of the court below is correct and should be affirmed.

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SUPREME COURT OF THE UNITED STATES.

No. 366.—October Term, 1942.

The United States, Petitioner, vs. Brooks-Callaway Company. } On Writ of Certiorari to the Court of Claims.

[February 1, 1943.]

Mr. Justice Murphy delivered the opinion of the Court.

We are asked to decide whether the proviso to Article 9 of the Standard Form of Government Construction Contract[1] which provides that a contractor shall not be charged with liquidated damages because of delays due to unforseeable causes beyond the control and without the fault of the contractor, including floods, requires the remission of liquidated damages for delay caused by high water found to have been customary and forseeable by the contracting officer.

Respondent brought this suit in the Court of Claims to recover the sum of $3,900 which was deducted from the contract price as liquidated damages for delay in the completion of a contract for the construction of levees on the Mississippi River. The contract was not completed until 290 days after the date set, and liquidated damages in the amount of $5,800 (figured at the contract rate of $20 for each day of delay) were originally assessed. Respondent protested, and upon consideration the contracting officer found that respondent had been delayed a total of 278 days by high water, 183 days of which were due to conditions normally to be expected and 95 of which were unforseeable. He recommended that liquidated damages in the amount of $1,900 (representing 95 days of unforeseeable delay at $20 per day) be re-

[1] In general Article 9 gives the Government the option of terminating the contractor's right to proceed, or of allowing him to proceed subject to liquidated damages if he fails to proceed with diligence or to complete the work in time. The full text of the proviso is:

". . . *Provided*, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes: . . ."

mitted and that the balance of $3,900 be retained. Payment was made on this basis.[2]

The Court of Claims held that liquidated damages should not have been assessed for any of the 278 days of delay caused by high water because the high water was a "flood" and under the proviso all floods were unforseeable *per se*. Accordingly, it gave judgment in respondent's favor in the sum of $3,660.[3] No findings were made as to whether any of the high water was in fact foreseeable. We granted certiorari because the case presents an important question in the interpretation of the Standard Form of Government Construction Contract.

We believe that the construction adopted below is contrary to the purpose and sense of the proviso and may easily produce unreasonable results. The purpose of the proviso is to remove uncertainty and needless litigation by defining with some particularity the otherwise hazy area of unforseeable events which might excuse non-performance within the contract period. Thus contractors know they are not to be penalized for unexpected impediments to prompt performance, and, since their bids can be based on forseeable and probable, rather than possible hindrances, the Government secures the benefit of lower bids and an enlarged selection of bidders.

To avoid a narrow construction of the term, "unforseeable causes", limiting it perhaps to acts of God, the proviso sets forth some illustrations of unforseeable interferences. These it describes as "including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather, or delays of subcontractors due to such causes". The purpose of the proviso to protect the contractor against the unexpected, and its grammatical sense both militate against holding that the listed events are always to be regarded as unforseeable, no matter what the attendant circumstances are. Rather,

[2] The contracting officer found that the remaining delay of 12 days (the difference between the total delay of 290 days and the 278 days due to high water) was not excusable, as claimed by respondent, on account of the Government's failure to secure a necessary right of way, or on account of the requirement by the contracting officer that respondent build a tie-in levee. On these points the court below sustained the conclusions of the contracting officer. Respondent has not appealed and this phase of the case is not before us.

[3] — C. Cls. —, decided June 1, 1942.

the adjective "unforseeable" must modify each event set out in the "including" phrase. Otherwise absurd results are produced as was well pointed out by Judge Madden, dissenting below:

". . . Not every fire or quarantine or strike or freight embargo should be an excuse for delay under the proviso. The contract might be one to excavate for a building in an area where a coal mine had been on fire for years, well known to everybody, including the contractor, and where a large element of the contract price was attributable to this known difficulty. A quarantine, or freight embargo, may have been in effect for many years as a permanent policy of the controlling government. A strike may be an old and chronic one whose settlement within an early period is not expected. In any of these situations there could be no possible reason why the contractor, who of course anticipated these obstacles in his estimate of time and cost, should have his time extended because of them.

The same is true of high water or 'floods'. The normally expected high water in a stream over the course of a year, being foreseeable, is not an 'unforseeable' cause of delay. Here plaintiff's vice-president testified that in making its bid plaintiff took into consideration the fact that there would be high water and that when there was, work on the levee would stop. . . ."[4]

A logical application of the decision below would even excuse delays from the causes listed although they were within the control, or caused by the fault of the contractor, and this despite the proviso's requirement that the events be "beyond the control and without the fault or negligence of the contractor". If fire is always an excuse, a contractor is free to use inflammable materials in a tinder-box factory and escape any damages for delay due to a resulting fire. Any contractor could shut his eyes to the extremest probability that any of the listed events might occur, submit a low bid, and then take his own good time to finish the work free of the compulsion of mounting damages, thus making the time fixed for completion practically meaningless and depriving the Government of all recompense for the delay.

We intimate no opinion on whether the high water amounted to a "flood" within the meaning of the proviso. Whether high water or flood, the sense of the proviso requires it to be unforeseeable before remission of liquidated damages for delay is warranted. The contracting officer found that 183 days of delay caused by high water were due to conditions normally to be expected. No

[4] — C. Cls. —, —.

appeal appears to have been taken from his decision to the head of the department, and it is not clear whether his findings were communicated to respondent so that it might have appealed. The Court of Claims did not determine whether respondent was concluded by the findings of the contracting officer under the second proviso to Article 9,[5] and not having made this threshold determination, of course made no findings itself as to foreseeability. We think these matters should be determined in the first instance by the Court of Claims. Accordingly the judgment is reversed and the cause remanded with instructions to determine whether respondent is concluded by the findings of the contracting officer, and, if not, for a finding by the court whether the 183 days of high water or any part of that time were in fact foreseeable.

So ordered.

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[5] The second proviso to Article 9 immediately follows the unforeseeability proviso and states:

"*Provided further*, That the contractor shall within ten days from the beginning of any such delay notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay, and his findings of facts thereon shall be final and conclusive on the parties thereto, subject only to appeal, within thirty days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay shall be final and conclusive on the parties hereto."

A true copy.

Test:

Clerk, Supreme Court, U. S.